STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 6, 2005
v	No. 255721 Wayne Circuit Court
WAYNE EDWIN DONALDSON, Defendant-Appellee.	LC No. 04-002883-01

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion to quash. We reverse and remand for reinstatement of the charge. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendant was charged with operating a motor vehicle under the influence of intoxicating liquor, third offense (OUIL third). MCL 257.625(1), (9)(c). The evidence produced at the preliminary examination showed that after consuming a large amount of alcohol, defendant left home in his car. Realizing that he had had too much to drink, defendant pulled into the parking lot of a school, where he passed out before he could turn off the engine. Shortly after midnight on January 1, 2004 while on patrol, a police officer saw defendant's car in the parking lot of a school. The car was sitting "sideways across several parking spots." The key was in the ignition, the engine was running with the gearshift in park, and the lights were on. Upon investigation, the officer found defendant asleep behind the wheel. The officer rapped on the window approximately three times, but got no response. He opened the door and touched defendant's shoulder to rouse him. Defendant was then arrested after failing field sobriety tests.

The magistrate rejected defendant's argument that he was not operating a motor vehicle when the police arrived, and bound him over for trial. The circuit court agreed with defendant, ruling that, pursuant to *People v Wood*, 450 Mich 399; 538 NW2d 351 (1995), and *People v Burton*, 252 Mich App 130; 651 NW2d 143 (2002), defendant was not operating his vehicle.

II. STANDARD OF REVIEW

We review the circuit court's analysis of the bindover process de novo. We must determine if the magistrate committed an abuse of discretion in finding probable cause to believe

that the defendant committed the offenses charged. We decide whether the evidence presented to the magistrate was sufficient to establish, as a matter of law, that the offenses charged probably were committed by the defendant. There must be evidence of each element of the crime charged or evidence from which the elements can be inferred, although the evidence need not establish guilt beyond a reasonable doubt. *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994).

III. ANALYSIS

In *Wood*, *supra*, the defendant was found unconscious slumped over the wheel of his van, which was at the drive-through window of a restaurant. The engine was running and the gearshift was in drive, but the defendant's foot was on the brake. *Wood*, *supra* at 402. The Court held that "[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *Id*. at 404-405. The Court concluded that because the defendant had driven the van and only his foot on the brake prevented it from moving, it still posed a risk of collision and thus he was operating the vehicle. *Id*. at 405.

In *Burton*, *supra*, the defendant drove his truck across a parking lot. He was found asleep behind the wheel of his truck, which was still in the parking lot. The engine was running and the gearshift was either in park or neutral. *Burton*, *supra* at 132, 142. The defendant was charged with and convicted of attempted OUIL third on the theory that he planned to drive away from the parking lot but was prevented from doing so by police intervention. *Id*. at 141. This Court ruled in part that the evidence was insufficient to prove that the defendant "was intending to 'operate' his truck" because it was not in motion, it was parked, and it was not "in a position posing a significant risk of causing a collision," given that the transmission was not in gear. *Id*. at 143-145.

In *People v Solmonson*, 261 Mich App 657; 683 NW2d 761 (2004), the defendant was found unconscious behind the wheel of his car, which was on the side of the road. The engine was off but the key was in the ignition, and the engine was still warm. The defendant admitted that he had been driving. *Id*. at 660. The defendant, citing *Wood*, *supra*, and *Burton*, *supra*, argued that he was not "operating" his car. The *Solmonson* Court disagreed, ruling as follows:

> Defendant's reliance on *Wood* and *Burton* is misplaced. In *Wood* our Supreme Court limited *People v Pomeroy* (*On Rehearing*), 419 Mich 441, 444; 355 NW2d 98 (1984), which held, "a person sleeping in a motionless car cannot be held to be presently operating a vehicle while sleeping." In *Burton* the prosecutor charged that defendant was attempting to drive while intoxicated at the time the police found him unconscious in his lawfully parked vehicle with its engine running. This Court held that the prosecution failed to prove its theory that the unconscious defendant specifically intended to operate the vehicle while intoxicated at some point in the future but the police intervened before he could do so. *Burton*, *supra* at 143-144. But here, the prosecutor did not claim that the evidence established defendant was operating the vehicle at the point the police found him unconscious or that the police found defendant attempting to operate a vehicle while intoxicated. Here, the prosecutor argued that the evidence at trial

> presented a compelling circumstantial case that defendant had driven while intoxicated to the location where the police found him. [*Id.* at 662.]

In this case, as in *Solmonson*, *supra*, the prosecutor's theory was not that defendant was operating his vehicle while intoxicated when the police officer came upon him in the parking lot, but rather that defendant was operating his vehicle while intoxicated when he drove from his house to the parking lot. The evidence adduced at the preliminary examination was sufficient to create probable cause to believe that defendant had driven his car to the parking lot and that he was under the influence of intoxicating liquor at the time. The circuit court erred in granting defendant's motion to quash.

Reversed and remanded for reinstatement of the charge. Jurisdiction is not retained.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello